Supreme Court, U.S.
FILED
MAR 25 1996
CLERK

No. 95-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Loralee and Charles Vasquez,
Petitioners,

v.

Lt. Charles Hernandez, Officers Robert Kierny, Jackie Lee Dukes, Daniel Dimenna, Joseph A. Sirigedas, Officer William Pfieffer, Stephen Gratace, Supervisor Jerry Erjavec, Anthony Iniquez, Howard Hatton and Lt. Bruno Jankausas,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PFIEFFER RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL S. HEFTER
Counsel of Record
LYNDA T. ROUNDTREE
HEFTER & RADKE
333 West Wacker Drive
Suite 1650
Chicago, Illinois 60606
(312) 444-9292

Counsel for Pfieffer Respondents

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

17 pp

QUESTIONS PRESENTED

Respondents William Pfieffer, Stephen Gratace, Jerry Erjavec, Anthony Iniquez, Howard Hatton and Bruno Jankausas (hereinafter collectively referred to as "the Pfieffer Respondents") object to the Petitioners' "Question Presented." The Pfieffer Respondents submit the following Question:

Whether an individual suffers a constitutional deprivation protectable under 42 U.S.C. Section 1983 where (1) there is no evidence that state actors conspired to deprive the individual of her right of access, and (2) the individual suffered no prejudice in her ability to prosecute her state law tort claim?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND OTHER LAWS	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT OF CERTIORARI	5
I.	
THERE IS NO BASIS FOR THE EXERCISE OF CERTIORARI JURISDICTION IN THIS CASE	5
A. The Seventh Circuit's Decision Does Not Conflict With The Fifth Circuit's Decision In *Ryland*	7
B. There Are No Public Policy Reasons That Demand Review Of The Seventh Circuit's Decision	9
C. The Pfieffer Respondents Were Entitled To Summary Judgment For the Additional Reason That There Was No Evidence That They Participated In Any Conspiracy	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	PAGE
Braxton v. United States, 500 U.S. 344, 111 S.Ct. 1854 (1991)	5
Dooley v. Reiss, 736 F.2d 1392 (9th Cir. 1984)	7, 8, 12
Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), *reh'g. denied*, 448 U.S. 913, 101 S.Ct. 33 (1980)	5, 12, 13
Lesser v. Braniff Airways, Inc., 518 F.2d 538 (7th Cir. 1975)	5
Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983)	6, 7, 8, 9
Simms v. Reiner, 419 F.Supp. 468 (N.D. Ill. 1976)	13
Singer v. Talbot, 595 F.Supp. 188 (D. Utah 1982)	7
Vasquez v. Hernandez, 60 F.3d 325 (7th Cir. 1995)	*passim*
Vasquez v. Hernandez, No. 91 C 4008, slip op. (N.D. Ill. May 17, 1994)	*passim*

No. 95-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Loralee and Charles Vasquez,

Petitioners,

v.

Lt. Charles Hernandez, Officers Robert Kierny, Jackie Lee Dukes, Daniel Dimenna, Joseph A. Sirigedas, Officer William Pfieffer, Stephen Gratace, Supervisor Jerry Erjavec, Anthony Iniquez, Howard Hatton and Lt. Bruno Jankausas,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PFIEFFER RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents William Pfieffer, Stephen Gratace, Jerry Erjavec, Anthony Iniquez, Howard Hatton and Bruno Jankausas (hereinafter collectively referred to as "the Pfieffer Respondents") respectfully request this Court to deny Loralee Vasquez and Charles Vasquez's petition for writ of certiorari ("Petition").

OPINIONS BELOW

The Pfieffer Respondents agree with Petitioners Loralee Vasquez and Charles Vasquez's (the "Vasquezes") citations of the opinions and judgments delivered in the courts below.

JURISDICTION

The Pfieffer Respondents agree with the Vasquezes' statement of the grounds on which the jurisdiction of this Court is invoked.

STATUTES AND OTHER LAWS

The Pfieffer Respondents agree with the Vasquezes' statement of the statutes and other laws involved.

STATEMENT OF THE CASE

The Pfieffer Respondents object to the misstatements and omissions made by the Vasquezes in their presentation of the Statement of the Case; the Pfieffer Respondents therefore present their own Statement of the Case as follows:

On January 27, 1991,[1] Super Bowl Sunday, Petitioner Loralee Vasquez was struck in the ear by a stray bullet fired by one of several off-duty Cicero police officers who were in the back yard of respondent Charles Hernandez's home shooting at a picture of Saddam Hussein. Mrs. Vasquez and her husband, Charles Vasquez, brought this

---

[1] The Vasquezes' petition incorrectly states the date of the shooting as July 21, 1991. Pet. 2.

case against two groups of defendants/respondents: (1) the officers who were involved in the shooting or were present at Hernandez's house at the time of the shooting; and (2) the officers involved in the investigation of the shooting. The second group of officers, the Pfieffer Respondents, was not present at the time Loralee Vasquez was shot. Rather, each was a Cicero police officer who was on duty at the time of the shooting. *Vasquez v. Hernandez*, No. 91 C 4008, slip op. at 5-17 (N.D. Ill. May 17, 1994), Pet. App.18-19. Pfieffer and Gratace were patrol officers who responded to the call reporting that Loralee Vasquez had been shot. *Id.*, at 5, Pet. App. 21. Erjavec, the on-duty Street Supervisor, also responded to the call reporting the shooting. *Id.*, at 16, Pet. App. 30. Hatton and Iniquez were the detectives sent to investigate the shooting. *Id.*, at 9, Pet App. 24-25. Jankauskas was the Shift Lieutenant on duty at the Cicero police station at the time of the shooting. *Id.*, 12, Pet. App. 27.

After examining the Vasquezes' home and garage, Pfieffer, the first officer to arrive on the scene, found two spent bullets that he turned over to Hatton and Iniquez later that night (along with a general report form completed by Pfieffer). *Id.*, at 5-8, Pet. App. 21-23. In addition, Pfieffer spoke to Hernandez, who had walked over to Pfieffer while Pfieffer was examining the exterior of the Vasquezes' house. *Id.*, at 6-7, Pet. App. 22. Hernandez, who lived behind the Vasquezes, told Pfieffer that the bullets were probably intended for him because he was having problems with some gang members. *Id.*

Hatton and Iniquez followed up on Pfieffer's initial investigation. The detectives interviewed the Vasquezes and inspected their house. *Id.*, at 9-10, Pet. App. 25. In addition, Hatton and Iniquez interviewed Hernandez. *Id.*,

at 10, Pet. App. 25-26. After returning to the police station, Hatton and Iniquez placed the spent bullets (which they had earlier received from Pfieffer and had temporarily placed in an envelope and put on a clipboard) in Iniquez' desk drawer, which they then locked. *Id.*, at 10-12, Pet. App. 25-27. The detectives then filled out a tour of duty report, which they submitted along with Pfeiffer's general report form, to their superior Lieutenant Baldwin (who also happened to be the head of Internal Affairs), in which the Pfieffer's retrieval of the bullets and the receipt of the bullets from Pfieffer was reported. *Id.* All of this was done because the detectives believed there would be an Internal Affairs investigation and they wanted to make sure that the evidence was preserved and that nothing happened to it.

The bullets remained in Iniquez's desk drawer and the case file remained open until approximately four months later when the F.B.I., the Illinois State Police and the Cook County State's Attorney formed a joint task force to investigate the shooting. *Vasquez v. Hernandez,* 60 F.3d 325, 327 (7th Cir. 1995), Pet. App. 3. The task force produced numerous documents, including additional witness statements, and retrieved physical evidence from Hernandez' yard. *Id.* In addition, the task force conducted various examinations on certain officers' guns with the bullets retrieved and on the weapons of guests at Hernandez's party, and set up a laser trajectory system to determine the path of the bullets. *Id.*

REASONS FOR DENYING THE WRIT OF CERTIORARI

This case presents no important question deserving this Court's review, nor does it present any frequently recurring question as evidenced by the relatively few reported decisions on this subject. Most important, there is no conflict between the Seventh Circuit's decision in this case and the decisions of other Circuit Courts of Appeals. *See Braxton v. United States,* 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991) (a principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among the circuits). Finally, the Vasquezes have misstated both the law and the facts. For these reasons, the petition for writ of certiorari should be denied.

I.

THERE IS NO BASIS FOR THE EXERCISE OF CERTIORARI JURISDICTION IN THIS CASE

In its thorough discussion of the right of access issue, the Seventh Circuit affirmed the District Court's grant of summary judgment because it found that, on the uncontradicted evidence, the Vasquezes were not deprived of any constitutional right and that there was, therefore, no violation of 42 U.S.C. Section 1983. *Vasquez v. Hernandez,* 60 F.3d 325, 329 (7th Cir. 1995), Pet. App. 7. Liability on a conspiracy theory pursuant to 42 U.S.C. Section 1983 requires proof of (1) a conspiracy, and (2) an actual deprivation of a constitutional right. *Hampton v. Hanrahan,* 600 F.2d 600, 622-23 (7th Cir. 1979) *reh'g denied,* 448 U.S. 913, 101 S.Ct. 33 (1980) *citing Lesser v. Braniff Airways, Inc.,* 518 F.2d 538, 540 n.2 (7th Cir. 1975). Thus, in order to prevail on their claim that the

Pfieffer Respondents violated Section 1983 by covering up their alleged knowledge of who shot Mrs. Vasquez and thus depriving the Vasquezes of their constitutional right of access to the courts to seek redress from those persons, the Vasquezes were required to prove, *inter alia*, that as a proximate result of the alleged conspiracy, they were in fact deprived of the ability (which they would have had absent the alleged conspiracy) to obtain redress in court for the shooting of Loralee Vasquez. The Seventh Circuit correctly found that, after full discovery, there was no evidence that that was the case. Indeed, as part of the very same case, the plaintiffs *were* suing the people they contend shot Mrs. Vasquez for shooting her, and were armed in that case with massive amounts of evidence compiled by the task force. The Seventh Circuit correctly held that the five-months that elapsed between the day of the shooting and the day on which the plaintiffs filed suit against those whom they contend shot her did not amount to any prejudice. *Vasquez v. Hernandez*, 60 F.3d at 329, Pet. App. 6. The Vasquezes have not been prevented from pursuing their pendent state law tort claims (and indeed filed a complaint in state court after the District Court granted summary judgment in this case on the federal law claims) and the value of such claims has not been reduced at all by the alleged cover-up. *Vasquez v. Hernandez*, 60 F.3d 329, Pet. App. 6-7.

The Vasquezes contend, however, that the Seventh Circuit's decision requires individuals alleging denial of access to courts to demonstrate a total loss of a cause of action, and is thus in conflict with the Fifth Circuit's opinion in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). Furthermore, the Vasquezes argue that such a requirement encourages state actors to conceal wrongful

acts and places an onerous burden on plaintiffs. These arguments do not withstand scrutiny.

A. The Seventh Circuit's Decision Does Not Conflict With The Fifth Circuit's Decision In *Ryland*

The Vasquezes contend that the Seventh Circuit's decision requires a total loss of a cause of action and, thus, is at odds with the Fifth Circuit's decision in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), Pet. 6. The Vasquezes' contention is wrong for two reasons.

First, the Seventh Circuit decision *does not* require a total loss of a cause of action before a constitutional injury will be recognized. What *is* required by the Seventh Circuit's decision (and what is required in all cases, including civil rights cases), is that *some* harm must be demonstrated. *See, infra* pp. 8-9.

> Every plaintiff has the duty of proving that there was a duty owing on the part of the defendant, that defendant breached that duty and as a result plaintiff has been injured. Plaintiffs cannot relieve themselves from these burdens by merely alleging they are being denied their constitutional right of access to courts.

Singer v. Talbot, 595 F. Supp. 188 (D. Utah 1982).

For example, in *Dooley v. Reiss*, 736 F.2d 1392 (9th Cir. 1984), the Ninth Circuit unequivocally held that the plaintiffs had not been deprived of a constitutional right by the defendants' attempt to conceal certain evidence because "the attempt ultimately failed" *Id.* In *Dooley*, the underlying incident was an alleged unlawful search committed by certain police officers. *Id.* The plaintiffs, after wining damages in a jury trial for the unlawful search, sued the defendants alleging that the defendants had

sought to deprive the plaintiffs of the testimony of four potential witnesses in the underlying case. *Id.*, at 1393-94. The witnesses were named in police reports that the defendants delayed in turning over to the plaintiffs. *Id.* The Ninth Circuit concluded that there was no deprivation of a constitutional right because the unlawful search case had "vindicated the plaintiffs' federal rights." *Id.* Thus, even though (unlike here) the delay in *Dooley* arguably prejudiced the plaintiffs inasmuch as, by the time the reports were turned over to the plaintiffs, they were unable to locate the witnesses, the court found no deprivation of constitutional rights because the plaintiffs *were* able to successfully sue those who had wronged them. *Id.* Here, as the Seventh Circuit and the District Court made clear, the Vasquezes have failed to demonstrate *any harm* from the alleged conspiracy on the part of the Pfieffer Respondents. *Vasquez v. Hernandez*,60 F.3d at 329, Pet. App. 6-7; *Vasquez v. Hernandez*, 91 C 4008, slip op. 28-29, Pet. App. 42-43.

Second, the Seventh Court's decision—*that some harm must be demonstrated*—is not at odds with the Fifth Circuit's decision in *Ryland*. *Ryland* did not hold that any and every delay—no matter how brief and whether or not prejudice has occurred—equals constitutional injury. It merely held that the complaint in that particular case stated a cause of action for violation of the plaintiffs' constitutionally protected right to access by alleging that state officers conspired to conceal the murder of their daughter and thus thwarted their ability to bring a wrongful death action. *Ryland v. Shapiro*, 708 F.2d at 973-975. The Fifth Circuit then remanded the case to the District Court for, *inter alia*, a determination as to whether the delay *actually prejudiced* the litigants' right of access. *Id.* In remanding the case, the Fifth Circuit ex-

pressly endorsed the view taken by the Seventh Circuit in this case (*i.e.*, that some prejudice must have occurred in order for there to have been constitutional injury) by noting:

> We have previously held that "if state officers conspire . . . in such a way as to defeat or prejudice a litigant's rights in state court, that would amount to a denial of equal protection of the laws by persons acting under color of state law." Conduct by state officers which results in delay in the prosecution of an action in state court *may* cause such prejudice.

Ryland, 708 F.2d at 974 (Citations omitted, emphasis added.)

That statement is *fully* consistent with the Seventh Circuit's decision here. The Seventh Circuit did not hold that wrongful conduct that delays a plaintiff's ability to bring an action can *never* constitute a deprivation of the right of effective access to the courts. *Vasquez v. Hernandez*, 60 F.3d at 329, Pet. App. 7. Rather, the court affirmed the District Court's holding that here there was no evidence of prejudice due to the delay, and that, therefore, as a matter of law, the Pfieffer Respondents (the investigating officers) did not violate the Vasquezes' constitutional rights. *Vasquez v. Hernandez*, 60 F.3d at 329, Pet. App. 7.

B. There Are No Public Policy Reasons That Demand Review Of The Seventh Circuit's Decision

The Vasquezes' second argument for review of this case is founded upon two public policy arguments or concerns. First, the Vasquezes contend that the Seventh Circuit's decision demands review because it encourages police to

conceal wrongful conduct. Pet. 5, 7, 8. Essentially, the Vasquezes' position is that, if a cover-up succeeds, an officer's initial wrongdoing is buried, and he suffers no harm. If, on the other hand, the cover up fails, he is not liable for the cover-up, but only the initial wrongdoing. Thus, the Vasquezes' claim, the officer risks nothing by covering up his wrongdoing. That is, however, an inaccurate analysis.

The accurate analysis, is that a policy of punishing failed cover-up attempts is hardly likely to deter such attempts; a cover-up is attempted precisely because the officer believes that it will succeed in forever hiding the initial wrongdoing and he will therefore never be punished for anything. If the cover-up fails before any harm has resulted, the officer (if he is the initial wrongdoer) is liable for the initial wrongdoing. If the cover-up is ultimately exposed, but not until after it has succeeded in harming the plaintiff's ability to pursue a claim for the initial wrongdoing (because, for example, an important witness dies before the cover-up is exposed), the officer—who might have won the underlying case (or who might not himself even have been a defendant in the underlying case) then becomes liable for the constitutional deprivation. Thus, under the Seventh Circuit's opinion in this case, there is substantial risk in attempting a cover-up, and thus a substantial deterrent to doing so.

Moreover, a policy of not punishing attempted cover-ups unless some prejudice to the underlying case has resulted encourages officers who have engaged in cover-ups but who subsequently have second thoughts to come forward while the plaintiff can still obtain relief from the wrongdoer. A policy of punishing all attempted cover-ups—no matter how brief and regardless of whether or

not harm has yet come to the plaintiff—would discourage such officers from coming forward, and would in fact encourage them to make further and more extreme efforts to make certain that the cover-up is never exposed and the plaintiff is never able to obtain relief from anyone.

Second, the Vasquezes argue that the Seventh Circuit's decision places an "onerous burden" on plaintiffs by requiring them to demonstrate how they have been prejudiced by the conduct of which they are complaining. Pet. 5, 7. Simply stated, that contention is ridiculous. From the beginning of our legal system, plaintiffs have always been required to demonstrate how they have been harmed by some conduct; conduct without harm is not actionable. Here, both the District Court and the Seventh Circuit found that there was no evidence that the Vasquezes suffered any harm whatsoever as a result of the alleged cover-up. In fact, both courts made special note of the fact that the Vasquezes actually benefitted from filing their case five months after the shooting, rather than filing on the day after the shooting occurred:

> The question then becomes: What is the Constitutional injury here? Plaintiffs claim the alleged conspiracy blocked their access to the courthouse door. Yet Plaintiffs have come to the courthouse equipped with more information and evidence than they would have if they had brought this suit without the efforts of the FBI. The studies conducted by the FBI have revealed not only the direction from which the shots were fired, but also the type of gun which fired the shots and the linkage between certain officer's weapons and the bullets . . . [I]t is rare that a plaintiff has before him the magnitude of arrows in his quiver that the FBI has supplied these Plaintiffs in this case.

Vasquez v. Hernandez, No. 91 C 4008, slip op. at 29, Pet. App. 42-43.

Moreover, by contending that the plaintiffs should not be required to prove how they have been harmed, the Vasquezes are proposing that this Court recognize a brand new standard of liability under the Civil Rights Act—*i.e.*, that unsuccessful attempts to violate a person's civil rights are actionable. Other Circuits, as well as the Seventh Circuit in this case, have correctly held that this is not the law. *Dooley v. Reis, supra.*

C. The Pfieffer Respondents Were Entitled To Summary Judgment For the Additional Reason That There Was No Evidence That They Participated In Any Conspiracy

Finally, the Vasquezes completely misstate the evidence in this case by claiming that "the record in the present case overwhelmingly demonstrates that the Respondents obstructed any *bona fide* investigation of the events leading to the shooting of the Petitioner." Pet. 5-6. That is *far* from the truth. To establish a civil rights conspiracy a plaintiff must establish the existence of a conspiratorial agreement and some overt act in furtherance of the alleged conspiracy. *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979). However, in this case the District Court expressly found that there was *no evidence* of the Pfieffer Respondents' participation in any conspiracy:

> The record is void of any evidence of a meeting of the minds or an understanding between the co-conspirators that would suggest that the officers were each willful participants in a scheme to cover-up the shooting.

Vasquez v. Hernandez, No. 91 C 4008, slip op. at 24, Pet. App. 38.

Thus, summary judgment was properly granted in favor of the Pfieffer Respondents because the Vasquezes were required to present some evidence of a civil rights conspiracy and they failed to do so. *Hampton v. Hanrahan*, 600 F.2d 600, 622-23 (7th Cir. 1979). Although the standard for allowing conspiracy cases to go to the jury is fairly liberal because of the nature of conspiracies and of the evidence of them, courts have always required plaintiffs to present *some* evidence up on which a jury could rationally find a conspiracy and here there was none. *See, Simms v. Reiner,* 419 F.Supp. 468, 474 (N.D. Ill. 1976) (summary judgment appropriate where there was no material issue of the existence of a conspiracy).

CONCLUSION

For the foregoing reasons, the Vasquezes' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL S. HEFTER
Counsel of Record
LYNDA T. ROUNDTREE
HEFTER & RADKE
333 West Wacker Drive
Suite 1650
Chicago, Illinois 60606
(312) 444-9292

Counsel for
Pfieffer Respondents

March 22, 1996